Teo Ah Bin @ Teo Eng Bin v Tan Kheng Guan

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–193 OF 1997(1)
SYED AHMAD HELMY JC
31 JANUARY 2002

Equity *— Equitable remedies and reliefs — Specific performance — Estoppel by conduct — Plaintiff's conduct proved conclusively that he granted a loan to defendant — Whether plaintiff estopped by election from seeking specific performance on his assertion of a trust*

Limitation *— Trusts — Resulting trust — Defendant failed to exercise the option to purchase — Plaintiff claiming beneficial interest — Whether there exist clear evidence of trust — Whether claim is statute barred when looked against the first action for specific performance initiated in 1974 — Whether Limitation Act 1953 s 6(1)(a) applies*

Trusts and Trustees *— Land — Declaration of trusts — Declaratory reliefs that the defendant holds on trust $^{4}/_{10}$ of undivided share — Defendant reducing his shareholding to $^{4}/_{10}$ share by reason of plaintiff's further payment of earnest monies — Plaintiff's conduct shows an assertion as a creditor and not beneficiary of a trust — Whether an express trust in favour of plaintiff has been created*

In January 1973, the defendant had represented to plaintiff that he had an option to purchase 52 acres of land in Johor and approached the plaintiff who paid 10% on behalf of defendant to exercise the option. The defendant, unable to come up with the payment of his share, had agreed to reduced his shareholding to $^{4}/_{10}$ by reason of plaintiff's further payment of the earnest monies. Thus, the plaintiff's conduct showed an assertion as a creditor and not a beneficiary of a trust. The plaintiff's claim is for declaratory reliefs that the defendant holds on trust $^{4}/_{10}$ of the undivided share in the land for the plaintiff and that the latter execute all necessary documents to effectuate the transfer. The issue for determination in this action is whether an express trust in favour of plaintiff had been created by the terms of the agreements aforesaid in respect of the $^{4}/_{10}$ undivided share in the land.

Held, dismissing the plaintiff's claim with costs:

(1) For a trust to be created, there must be clear intention to create a trust — the usage of the word 'trust' per se in the absence of other factors is insufficient to create a trust. On the contrary, the conduct of the plaintiff up till 1997 without doubt showed an assertion as a creditor and not beneficiary of a trust (see p 127B–C).

(2) The plaintiff's conduct proved conclusively that he had granted a loan to the defendant. Hence, the plaintiff was estopped by his conduct from claiming otherwise or claiming that he had a beneficial interest over the lands (see p 127G); *Leong Cheong Kweng Mines Ltd v Kok Hoong* [1962] MLJ 224 followed. The plaintiff herein after approbating the contract through specific performance could not reprobate it and averred against it or offered evidence to contradict it through the assertion of a trust.

That is the very essence of estoppel by election (see p 128A–B); *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7 followed.

(3) Though trust is not caught within the ambit of the Limitation Act 1953 nevertheless, there must be clear evidence of trust — and the factual matrix herein negatived such evidence (see p 128C–D); *Letchumanan Chettiar v Palaniappa Chettiar* [1983] 1 MLJ 6; *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115 followed.

(4) The nature of the plaintiff's claim herein is undoubtedly based on contract for money advanced and not a trust, resulting, constructive or otherwise, as the conduct of the plaintiff negatives one and hence by reason of the contractual nature, limitation would invariably set in if no claim is instituted within six years under s 6(1)(a) of the Limitation Act 1953. The failure by the plaintiff to institute action within six years had resulted in the claim being statute barred (see p 128D–E).

(5) There was also delay on the part of the plaintiff to seek relief more so when looked against the perspective of the first action for specific performance initiated in 1974 and the subsequent action which was initiated in 1996 and 1997. The principle that delay defeats equities or equity aids the vigilant and not the indolent had to be applied vigorously against the plaintiff (see p 128F–G).

[Bahasa Malaysia summary

Pada bulan Januari 1973, defendan telah mengemukakan kepada plaintif bahawa beliau mempunyai satu opsyen untuk membeli 52 ekar tanah di Johor dan bersemuka dengan plaintif yang telah membayar 10% bagi pihak defendan untuk melaksanakan opsyen tersebut. Defendant, yang tidak mampu membuat bayaran untuk bahagian beliau, telah bersetuju untuk mengurangkan pemegangan saham beliau kepada $^{4}/_{10}$ oleh sebab bayaran cengkeram selanjutnya oleh plaintif. Oleh itu, perbuatan plaintif menunjukkan satu penegasan sebagai seorang pemiutang dan bukan seorang benefisiari satu amanah. Tuntutan plaintif adalah untuk relif-relif deklaratori bahawa defendan memegang amanah $^{4}/_{10}$ saham yang tidak dibahagikan ke atas tanah tersebut dan bahawa beliau melaksanakan semua dokumen-dokumen yang perlu untuk melaksanakan pemindahan. Persoalan untuk ditentukan dalam tindakan ini adalah sama ada satu amanah yang nyata menyebelahi plaintif telah terbentuk oleh terma-terma perjanjian-perjanjian yang dinyatakan berhubung $^{4}/_{10}$ saham yang tidak dibahagikan ke atas tanah tersebut.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Untuk satu amanah dibentuk, perlu ada niat yang jelas untuk membentuk satu amanah — penggunaan perkataan 'trust' per se

A tanpa faktor-faktor lain tidak mencukupi untuk membentuk satu amanah. Sebaliknya, perbuatan plaintif sehingga 1997 tanpa ragu-ragu lagi menunjukkan bahawa satu penegasan sebagai seorang pemiutang dan bukan seorang benefisiari satu amanah (lihat ms 127B–C).

B (2) Perbuatan plaintiff membuktikan secara konklusif bahawa beliau telah memberikan pinjaman kepada defendan. Justeru itu, plaintif diestopkan oleh perbuatan beliau daripada menuntut sebaliknya atau menuntut bahawa beliau mempunyai kepentingan benefisiari atas tanah tersebut (lihat 127G); *Leong Cheong Kweng Mines Ltd v Kok Hoong* [1962] MLJ 224 diikut. Plaintiff di sini C setelah memperkenankan kontrak tersebut melalui pelaksanaan spesifik tidak boleh mengutuknya dan menegas sebaliknya atau menawarkan keterangan untuk menyangkalnya dengan penegasan satu amanah. Inilah intipati estopel melalui pilihan (lihat ms 128A–B); *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7 diikut.

D (3) Walaupun amanah tidak terikat dalam lingkungan Akta Had Masa 1953 namun begitu, perlulah ada keterangan amanah yang jelas — dan berdasarkan matrix di sini menyangkal keterangan sedemikian (lihat ms 128C–D); *Letchumanan Chettiar v Palaniappa Chettiar* [1983] 1 MLJ 6; *Loo Cheng Suan Sabrina v* E *Khoo Oon Jin Eugene* [1995] 1 MLJ 115 dilihat.

(4) Sifat tuntutan plaintif di sini tanpa sebarang keraguan adalah berdasarkan kontrak untuk wang yang didahulukan dan bukan satu amanah, yang berbangkit, konstruktif atau sebaliknya, kerana perbuatan plaintif adalah menyangkal dan justeru itu oleh sebab sifat kontraktual tersebut, had masa akan bermula setiap kali jika F tiada tuntutan dimulakan dalam tempoh enam tahun di bawah s 6(1)(a) Akta Had Masa 1953. Kegagalan plaintif untuk memulakan tindakan dalam tempoh enam tahun telah mengakibatkan tuntutan tersebut telah dihalang oleh statut (lihat ms 128D–E)

G (5) Terdapat juga kelewatan di pihak plaintif untuk memohon relif lebih-lebih lagi apabila dilihat daripada perspektif tindakan pertama untuk pelaksanaan spesifik yang telah dimulakan pada tahun 1974 dan tindakan berikutnya yang telah dimulakan pada tahun 1996 dan 1997. Prinsip bahawa kelewatan menewaskan ekuiti atau ekuiti membantu seorang yang sentiasa berhati-hati H dan bukan seorang yang berat tulang harus diterapkan sepenuhnya terhadap plaintif (lihat ms 128F–G).]

Notes

For cases on declaration of trusts, see 12 *Mallal's Digest* (4th Ed, 2000 I Reissue) paras 1839–1840.

For cases on resulting trust, see 9 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2215–2216.

For cases on specific performance, equity see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2061–2083.

Cases referred to

Hill (Viscount) v Hill (Dowager Viscountess) [1987] QB 483 (refd)
Leong Cheong Kweng Mines Ltd v Kok Hoong [1962] MLJ 224 (folld)
Letchumanan Chettiar v Palaniappa Chettiar [1983] 1 MLJ 6 (refd)
Liew Choy Hung v Fork Kian Seng [2000] 1 MLJ 635 (refd)
Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene [1995] 1 MLJ 115 (refd)
Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd [1985] 1 MLJ 7 (folld)
Registrar of Titles' Johor v Temenggong Securities Ltd [1976] 2 MLJ 44 (refd)
Teppers Will Trusts Kramer & Anor, Re [1987] Ch 358 (refd)
Yap Joyce v Tee Molly & Anor [2000] 3 MLJ 599 (refd)

Legislation referred to

Limitation Act 1953 s 6(1)(a)

S Sagadeva (*Saga & Kumar*) for the plaintiff.
Badrol Hisham bin Mohd Sani (*Zainal & Badrol*) for the defendant.

Syed Ahmad Helmy JC: The plaintiff's claim herein is for declaratory reliefs that the defendant holds $^{4}/_{10}$ of the undivided share in the land known as Grant No 26627 Lot 5128 on trust for the plaintiff and the defendant execute all necessary documents to effectuate the transfer. The material facts in the action herein are as follows.

Sometime in January 1973, the defendant represented to plaintiff that he had an option to purchase 52 acres of land in Johor belonging to a church and approached the plaintiff. Based on the representation, the plaintiff paid 10% on behalf of defendant to exercise the option. The defendant was unable to come up with his portion and hence an agreement dated 20 January 1973 ('the First Agreement') was entered wherein the plaintiff was to provide all financial resources to secure the purchase — it was a term of the agreement that plaintiff would be entitled to $^{11}/_{20}$ and defendant $^{9}/_{20}$ undivided shares in the land.

The defendant was unable to come up with the funds (RM125,033.91) to purchase his $^{9}/_{20}$ share and hence by virtue of cl 2 thereof, pending payment he confirms and declares holding the $^{9}/_{20}$ undivided shares on trust for the plaintiff.

Later, on 25 February 1973, another agreement ('the Second Agreement') was entered into whereby defendant agreed to reduce his shareholding to $^{4}/_{10}$ share by reason of plaintiff's further payment of the earnest monies.

A As the defendant again failed to come up with the payment for his share, another agreement dated 27 February 1974 ('the Third Agreement') was entered into whereby the property's sale price was fixed at RM1m and the parties were given option to purchase the other's share within 30 days, the defendant being given the first right to exercise the option. There was a similar declaration by the defendant that he holds the $^4/_{10}$ of the undivided B shares on trust for the plaintiff until the sum of RM125,033.91 is fully settled by the defendant.

The defendant having failed to exercise the option, the plaintiff thereupon exercised the option and forwarded the sum of RM40,000 to defendant's solicitors Messrs Allen & Gledhill. The defendant refused to C honour the agreement and returned the RM40,000.

Against the background aforesaid, the plaintiff initiated an action in Civil Suit No 214–74 claiming specific performance of the Third Agreement.

The plaintiff obtained default judgment which was subsequently set D aside by the High Court and upheld by the Court of Appeal. The Court of Appeal directed that the writ be reserved but owing to the failure of the plaintiff to reserve, the writ expired and no further action was taken by the plaintiff. The High Court in setting aside the default judgment also ordered that the Registration of Titles Johor do enter a registrar's caveat on the $^4/_{10}$ E of the undivided shares in the said land.

The defendant instituted an ex parte action in Saman Pemula No 24–1070–1996 and obtained an order to set aside the registrar's caveat lodged on the land and for a declaration that he is the beneficial owner.

The plaintiff filed in an application to intervene and the High Court F allowed the plaintiff to intervene but refused to set aside the declaratory order as to the defendants beneficial ownership over the land obtained ex parte. Upon appeal, the Court of Appeal set aside the declaratory order on the ground that the High Court had no power to grant the declaration sought on an ex parte basis but it would appear the Court of Appeal did not go into the merits as to the question of beneficial ownership.

G In the light of the Court of Appeal's decision, the parties herein proceeded with the present application for adjudication on its merits.

The issue for determination in this action is whether an express trust in favour of plaintiff has been created by the terms of the agreements aforesaid in respect of the $^4/_{10}$ undivided share in the subject property known as H Lot 5128.

The plaintiff's claim that the undivided $^4/_{10}$ share is held on trust by the defendant is based on the First Agreement dated 20 January 1973 entered into between the parties, whereby by cl 2 thereof, the defendant confirms and declare that he holds the said undivided shares on I trust for the benefit of the plaintiff, and subsequently through reapportionment of the shares, it was reiterated in the Third Agreement dated 27 February 1974.

The determination of the issue herein would invariably involve a consideration of the background history as related above and the appraisal of all three agreements cumulatively and not in isolation.

The plaintiff contends that by reason of cl 3 of the Third Agreement dated 27 February 1974 there was an express declaration of trust and relies on the English case of *Hill (Viscount) v Hill (Dowager Viscountess)* [1987] QB 483 as proposition that the usage of the term trust would establish the creation of a trust. In that case, Chitty LJ stated at p 493:

> A trust undoubtedly may be created by any apt words, but the circumstances that the well understood and obvious term 'trust' is not used seems to me to be worthy of some consideration where the question is whether a trust is or is not intended to be created.

The plaintiff also referred to the case of *Yap Joyce v Tee Molly & Anor* [2000] 3 MLJ 599 in relation to the prerequisite of certainty of words, subject matter and object matter in the establishment of a trust and contends that the reference to '$^{4}/_{10}$ undivided shares' provides certainty of subject matter; the reference to the plaintiff provides certainty as to the object matter and the usage of the word 'trust' provides certainty as to the intention to create a trust.

The plaintiff further contends that a trust can be subjected to some condition precedent or condition subsequent and relies on the case of *Re Teppers Will Trusts Kramer & Anor* [1987] Ch 358 and by reason thereof the condition relating to the payment of RM125,033.91 by the defendant and the exercise of the option to purchase the defendant's $^{4}/_{10}$ undivided share by the plaintiff are conditions subsequent to the creation of the trust, which conditions will terminate the beneficial interest of the plaintiff upon the defendant repaying the sum of RM125,033.91.

By reason of the express trust created aforesaid, the plaintiff concludes that its claim is not barred by limitation under s 22 of the Limitation Act 1953.

Alternatively, the plaintiff contends that there is a resulting trust arising by reason of the plaintiff's payment of the purchase price of the property — *Liew Choy Hung v Fork Kian Seng* [2000] 1 MLJ 635 or constructive trust as it was the parties' common intention that the undivided share is to be held on trust and the plaintiff, in contributing 100% of purchase price, had suffered detriment and has performed all his obligations under the Third Agreement — *Registrar of Titles' Johor v Temenggong Securities Ltd* [1976] 2 MLJ 44.

The defendant, on the contrary, submits that the factual matrix clearly established that the transaction was one of loan advanced to the defendant by the plaintiff to assist the defendant to purchase his apportionment of the undivided share in the land.

In support of his contention, the defendant relied on the two earlier actions, namely Civil Suit 214–74 and 24–1070–96 and also the statutory declaration of the plaintiff in support of the entry of a private caveat in February 1977 to show that there was no assertion nor claim for beneficial

A interest over the undivided share. The plaintiff's own conduct as demonstrated by the earlier action clearly shows that he had no claims over the undivided share registered in defendant's name other than the moneys advanced and that the defendant's undivided share would constitute repayment of the loan and nothing more.

B I have carefully perused the available evidence and the written submissions of learned counsels for both the plaintiff and defendant and it is my considered view that for a trust to be created there must be clear intention to create a trust — the usage of the word 'trust' per se in the absence of other factors is insufficient to create a trust. On the contrary, the conduct of the plaintiff up till 1997 without doubt shows an assertion as a C creditor and not beneficiary of a trust. The conduct aforesaid together, with the admission on oath through the statutory declaration that the defendant was the owner of the $^4/_{10}$ undivided share as against the defendant's valuable consideration in bringing the business opportunity for the purchase of the land to the plaintiff and the plaintiff's own acknowledgment that it was fair for the defendant to receive some benefit, and the status of the defendant as D debtor in the borrowing of the sum of RM125,033.91 and expressly accepting a restriction against sale by himself until the debt is repaid all goes to show conclusively that there was never an intention to create a trust.

Underhill & Hayton in the *Law Relating to Trusts and Trustees* (14th Ed) at p 190 states:

E

> If payment is made at the request of and by way of loan to a person in whose name the property is vested, there will be no resulting trust, because in such circumstances, the lender did not advance the purchase money as purchaser but merely as *lender*. (Emphasis added.)

F Similarly, in *Equity & the Law of Trust* (7th Ed) at p 129, the learned author commented:

> Evidence must also show that the money was intended to be advanced by the person alleging the resulting trust in the character of purchaser: if the evidence merely established a loan of some or all the money used for the purchase, there will be no resulting trust and the person lending the money would be a mere G creditor.

As I have found above, the plaintiff's conduct proved conclusively that he had granted a loan to the defendant. Hence, the plaintiff is estopped by his conduct from claiming otherwise or claiming that he has a beneficial interest over the lands. Thomson CJ in *Leong Cheong Kweng Mines Ltd v Kok Hoong* H [1962] MLJ 224 at p 227 quoting *Ord v Ord* stated:

> 'An estoppel therefore is an admission or something which the law treats as equivalent to an admission, an extremely high and conclusive nature — so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to contradict it' — Also see s 115 of Evidence Act.

I The conduct of the plaintiff in initiating action for specific performance in Civil Suit 214–74 clearly establishes an election on his part not to insist on a trust and by such election estoppel by election applies.

In *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7, the Privy Council held that the vendor had altered its position to its detriment by raising and paying $297,500. The essential requirement of estoppel by election as satisfied. A

In short, the plaintiff herein after approbating the contract through specific performance cannot reprobate it and aver against it or offer evidence to contradict it through the assertion of a trust. That is the very essence of estoppel by election. As the learned author of *Sarkar's Law of Evidence* (13th Ed) at p 1157 in commenting on estoppel by conduct stated: B

> A party cannot be allowed to approbate and reprobate in the same transaction. They cannot vary a case set up in the lower court ... C

The initiation of the action for specific performance is clearly inconsistent with a claim for declaration of trust and establishes the election by the plaintiff as to specific performance, which election results in estoppel by election against a trust.

Though trust is not caught within the ambit of the Limitation Act 1953 nevertheless, as I have stated above there must be clear evidence of trust — *Letchumanan Chettiar v Palaniappa Chettiar* [1983] 1 MLJ 6; *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115 and the factual matrix herein negatives such evidence. D

The nature of the plaintiff's claim herein is undoubtedly based on contract for money advanced and not a trust, resulting, constructive or otherwise, as the conduct of the plaintiff negatives one and hence by reason of the contractual nature, limitation would invariably set in if no claim is instituted within six years under s 6(1)(a) of the Limitation Act 1953. The failure by the plaintiff to institute action within six years has resulted in the claim being statute barred. E F

There is also delay on the part of the plaintiff to seek relief more so when looked against the perspective of the first action for specific performance initiated in 1974 and the subsequent action which was initiated in 1996 and 1997. The principle that delay defeats equities or equity aids the vigilant and not the indolent has to be applied vigorously against the plaintiff. G

The plaintiff's reliance on *Tepper* is distinguishable — the condition subsequent therein was considered in the context of a bequest in a will — here it relates to a contract. In *Tepper*, there was one fund in respect of which the condition subsequent was to apply — here there are two holdings as borne out by the Third Agreement — the plaintiff's $^{6}/_{10}$ shareholding and defendant's $^{4}/_{10}$ shareholding and mutual options granted over the other's shareholdings. H

For the reasons adumbrated above, I accordingly dismiss the plaintiff's claim with costs.

Plaintiff's claim dismissed with costs. I

Reported by Ezatul Zuria Azhari